



February 8, 2001

Mr. R. Neel McDonald  
Attorney and Counselor at Law  
P.O. Box 153  
Wortham, Texas 76693

OR2001-0485

Dear Mr. McDonald:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144024.

The City of Wortham (the "city"), which you represent, received a request for information relating to the city police department, including records pertaining to a particular city police officer and the department's policy and procedure manual. The city claims that the requested information is excepted from disclosure under section 552.103 of the Government Code. Alternatively, the city believes that some of the responsive information in the officer's personnel file may be protected from disclosure by a right of privacy. We have considered the exceptions you raise and have reviewed the information you submitted. We also received and have reviewed the comments which the requestor submitted to this office. *See* Gov't Code § 552.304.

Section 552.103 of the Government Code, the "litigation exception," provides in relevant part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date that the governmental body received the written request for information and (2) the requested information is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, the governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, the city believes that the requestor “is acting in anticipation of future litigation.” In that regard, you inform this office that the requestor twice has been involved in litigation with the city in connection with a traffic citation. You do not inform us, however, that any litigation relating to the traffic ticket remains pending. You also state that “[i]mmediately after the trial . . . [the requestor] began threatening litigation against the city, the county, and the officer who issued the citation.” We also note the statement in the request for information that “[w]e anticipate other records or reports will be subject to subpoena at subsequent trials or hearings.” However, you do not provide this office with any other objective basis for the city’s belief that further litigation with the requestor may be forthcoming. *See* Open Records Decision Nos. 452 at 5 (1986) (requestor’s public threats of intent to sue do not alone trigger statutory predecessor to section 552.103), 331 at 1-2

(1982) (mere threats of litigation do not suffice to substantiate claim under statutory predecessor). Therefore, having thoroughly considered your arguments, we conclude that the city has not demonstrated that the submitted information relates to litigation that the city reasonably anticipated on the date of its receipt of the request for information. Thus, the city may not withhold the requested information under section 552.103.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). The privacy that section 552.102(a) affords to personnel records corresponds to the protection that section 552.101 provides in conjunction with the common law right to privacy. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found.*, 540 S.W.2d at 685. Employee privacy under section 552.102(a) is narrower than common law privacy under section 552.101, however, because of the greater legitimate public interest in matters involving public employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Generally, section 552.102(a) protects employee information from disclosure only when the information in question reveals "intimate details of a highly personal nature." See Open Records Decision No. 423 at 2 (1984). Upon careful review of the submitted information, we conclude that none of that information is excepted from disclosure under section 552.102. See, e.g., Open Records Decision Nos. 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation is not highly intimate or embarrassing fact about employee's personal affairs), 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of employee's resignation or termination), 405 at 2 (1983) (manner in which employee performed his or her job cannot be said to be of minimal interest to public).

We note, however, that section 552.117(2) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a peace officer, and information that reveals whether a peace officer has family members, regardless of whether the peace officer complies with section 552.024. See Gov't Code § 552.024(a). Thus, if the individual to whom the information in question pertains is a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, then the city must withhold information relating to the officer that is excepted from disclosure under section 552.117(2). We have marked that information.

Lastly, we also note that section 552.130 of the Government Code excepts from disclosure information relating to "a motor vehicle operator's or driver's license or permit issued by an

agency of this state” and “a motor vehicle title or registration issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1)-(2). We have marked a Texas driver’s license number and Texas license plate numbers that must be withheld from the requestor in accordance with section 552.130.

In summary, the submitted information is not excepted from disclosure under sections 552.103 or 552.102 of the Government Code. However, the city must withhold information that is excepted under sections 552.117(2) and 552.130. With those exceptions, the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

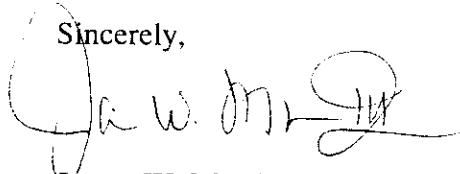
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M" at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/seg

Ref: ID# 144024

Encl: Submitted documents

cc: Mr. Charles H. Walker  
1218 Balmoral Drive  
Tyler, Texas 75703  
(w/o enclosures)